

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR GEDER BROWN,

Defendant-Appellant.

UNPUBLISHED

March 13, 2012

No. 302086

Kent Circuit Court

LC No. 10-005354-FH

Before: METER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv); possession of less than 25 grams of cocaine, MCL 333.7401(2)(a)(v); maintaining a drug house, MCL 333.7405(1)(d); and possession of a firearm by a felon, MCL 750.224f. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, and as a controlled substance second offender, MCL 333.7413(2), to 6 to 40 years' imprisonment; 3 to 15 years' imprisonment for the possession of a controlled substance conviction; 3 to 15 years' imprisonment for the maintaining a drug house conviction; and 3 to 15 years' imprisonment for the possession of a firearm by a felon conviction. We affirm.

On April 30, 2010, defendant was the target of a police investigation into the sale of narcotics from an apartment located at 35 Palmer Street in Grand Rapids. During this investigation, police established surveillance of the apartment and sent an undercover agent using marked bills to execute a controlled drug buy at the apartment. Later that day, the police arrested defendant after he left the apartment. Meanwhile, other police officers entered the apartment and found defendant's brother, Michael Vinson, as well as various narcotics, including cocaine and heroin. The police also found mail addressed to defendant at the apartment's address. Vinson and defendant were both charged, but Vinson pleaded guilty before trial.

At trial, Vinson testified that the apartment belonged to defendant and that defendant sold drugs from it. Detectives Maureen O'Brien and Todd Butler testified regarding their knowledge of drug transactions and characteristics that are generally consistent with drug trafficking. The detectives also testified about their personal observations regarding this case.

Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to object to Detective O'Brien's testimony regarding information that she received from neighbors and an informant, which defendant argues violated the rule against hearsay and also defendant's right to confront an adverse witness. Defendant alternatively argues that allowing this testimony was plain error that affected his substantial rights. We disagree.

Defendant preserved his ineffective assistance of counsel claim by moving for a *Ginther* hearing.¹ *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). Because we denied defendant's motion, however, our review of defendant's ineffective assistance of counsel claim is limited to plain errors apparent in the record. *Id.* Defendant's alternative claim that the trial court erred by admitting the testimony in violation of Michigan's evidentiary rule against hearsay, and defendant's right of confrontation is unpreserved because he did not object to the witness' testimony on these bases at trial. *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). Thus, we review defendant's alternative claim for plain error affecting defendant's substantial rights. *People v Payne*, 285 Mich App 181, 199; 774 NW2d 714 (2009). Under the plain error rule, defendant must show that the trial court committed a plain error that "affected the outcome of lower court proceedings." *Id.*

"The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel." *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2001). "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). Moreover, defense counsel "is not ineffective for failing to make a futile objection." *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007).

Both US Const, Am VI and Const 1963, art 1, § 20 "guarantee a criminal defendant the right to confront the witnesses against him or her. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant." *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009). "Statements are testimonial if the 'primary purpose' of the statements or the questioning that elicits them 'is to establish or prove past events potentially relevant to later criminal prosecution.'" *Id.* at 10, quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

¹ *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

In this case, Detective O'Brien testified that the surveillance and subsequent search of the 35 Palmer Street apartment was predicated on information an informant and neighbors provided regarding drug sales at the apartment. Although the information provided by the informant and the neighbors' complaints were "potentially relevant to a later criminal prosecution," the police gathered the statements not for the purpose of proving past events but to form the basis for their investigation of suspected criminal activity. Indeed, the prosecution did not offer these statements to establish the truth of the matter asserted, i.e., that defendant was involved in the sale of drugs out of the apartment but instead offered to explain why Detective O'Brien organized a surveillance of the apartment and how defendant came to be arrested. "[A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Chambers*, 277 Mich App at 11. As such, Detective O'Brien's testimony regarding the informant's tip and the neighborhood complaints did not violate MRE 802 or the Confrontation Clause. Thus, the trial court did not commit a plain error in allowing the testimony and defense counsel was not ineffective for failing to object to it.

Defendant also argues that the prosecution denied him a fair trial by improperly using Detectives O'Brien and Butler's drug profile testimony as substantive evidence of guilt. We disagree. Because defendant did not object to the detectives' testimony on the ground that such testimony was improper drug profile evidence, this issue is not preserved. *Bauder*, 269 Mich App at 177-178. We review unpreserved claims of evidentiary error for plain error affecting defendant's substantial rights. *Payne*, 285 Mich App at 199.

"Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit" *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Drug profile evidence "'is inherently prejudicial to the defendant because the profile may suggest that innocuous events indicate criminal activity.'" *Id.* at 53 (citation omitted). This is so because the characteristics at issue may not necessarily be connected to drug trafficking and "could apply equally to innocent individuals as well as to drug dealers." *Id.* Accordingly, the prosecution may not use drug profile evidence as substantive evidence of defendant's guilt. *Id.* at 53-54. Still, a prosecutor may use drug profile evidence "to aid the jury in understanding evidence in controlled substance cases." *Id.* at 53.

In this case, Detectives O'Brien and Butler both provided drug profile evidence. The detectives testified regarding various indicia of drug trafficking, such as visitor foot traffic, scales for weighing, firearms, and large denominations of cash. This Court has applied a four-factor test to help distinguish between the proper and improper use of drug profile evidence. "First, the reason given and accepted for the admission of the profile testimony must only be for a proper use—to assist the jury as background or modus operandi explanation." *Id.* at 56. In this case, the prosecution elicited testimony from both Detective O'Brien and Detective Butler regarding their experience and training with the Drug Enforcement Administration and the Grand Rapids Vice Unit, which indicated that the prosecution intended to use their drug profile testimony for the permissible purpose of assisting the jury in understanding the evidence pertaining to drugs. *Id.* at 56-57.

The second factor of the *Murray* test is that the prosecution “must introduce and argue some additional evidence . . . that the jury can use to draw an inference of criminality In other words, the pieces of the drug profile by themselves should not be used to establish the link between innocuous evidence and guilt.” *Id.* at 57. Here, the prosecution “did not argue that the drug profile was” substantive evidence of defendant’s guilt. Instead, the prosecution introduced and argued evidence in addition to the drug profile evidence in order “to establish the link between innocuous evidence and guilt.” *Id.* The prosecution presented evidence that defendant lived in and sold drugs from the apartment. The prosecution also introduced evidence that when the police searched defendant, they found the marked bills that the undercover police agent had used in a controlled purchase of drugs earlier that day.

The third factor of the *Murray* test requires the trial court to “make clear what is and what is not an appropriate use of the profile evidence. Thus, it is usually necessary for the court to instruct the jury with regard to the proper and limited use of profile testimony.” *Id.* In this case, the trial court did not give the jury a specific limiting instruction. See *id.* at 61.

The fourth factor of the *Murray* test is that the witness “should not express his opinion, based on a profile, that the defendant is guilty, nor should he expressly compare the defendant’s characteristics to the profile in such a way that guilt is necessarily implied.” *Id.* at 57. In this case, Detectives O’Brien and Butler “did not generally attempt to directly tie the profile testimony to defendant’s actions or characteristics in a manner that implied defendant’s guilt merely because of the connection, nor did they directly opine on the basis of such characteristics that defendant was a drug dealer.” *Id.* at 61. Instead, the detectives’ testimony merely indicated that certain innocuous characteristics regarding defendant’s case were consistent with drug dealing modus operandi. *Id.* at 59, 64-65.

Even though the trial court did not provide a clear limiting jury instruction under the third factor of the *Murray* test, we find that defendant fails to demonstrate that the trial court committed a plain error in admitting Detectives O’Brien and Butler’s drug profile testimony. In *Murray*, we noted that the four factors “*may be helpful* in distinguishing between the appropriate and inappropriate use of drug profile evidence and thus help to determine the admissibility of such evidence.” *Id.* at 56 (emphasis added). We find the trial court’s failure to provide a limiting jury instruction is not dispositive in this case. Viewing the record as a whole, we find that the prosecution did not rely “wholly or mainly” on the drug profile evidence to prove defendant’s guilt, and, thus, the trial court did not commit a plain error by allowing the detectives’ testimony. Moreover, even if the trial court’s admission of the detectives’ drug profile evidence constituted a plain error, defendant has not shown that this error affected the outcome of the trial. *Payne*, 285 Mich App at 199. As discussed above, the prosecution presented ample evidence of defendant’s guilt other than the detectives’ drug profile testimony.

Defendant further argues that the trial court’s failure to give a proper jury instruction regarding expert testimony and drug profile evidence denied defendant a fair trial. But defendant neither requested a cautionary instruction nor objected to the trial court’s failure to give such an instruction. Indeed, he expressed satisfaction with the trial court’s jury instructions, so at a minimum, defendant has forfeited appellate review of this claim. *People v Gonzalez*, 468 Mich

636, 643; 664 NW2d 159 (2003). For the reasons already discussed, defendant has not established plain error affected his substantial rights. *Id.* at 643. Moreover, defendant's expression of satisfaction with the trial court's jury instructions has affirmatively waived any errors. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

Defendant waived appellate review of additional claims of ineffective assistance of counsel by not raising them in his statement of questions presented. *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011). Even so, we find these claims to be without merit.

We affirm.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey